

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
T-MOBILE NORTHEAST, LLC
and
SUNSHINE FARMS, LLC**

Petitioners

Jacob Goralski
Oakleigh Thorne
Curtis Jews
Hillorie Morrison
For the Petition

Sean Hughes, Esquire
Attorney for Petitioners

Joshua Hockstra
Opposed to the Petition

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Board of Appeals Case No. S-2811
(OZAH No. 11-35)
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Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2811 was filed on May 24, 2011, by T-Mobile Northeast LLC and Sunshine Farms, LLC. Petitioners seek a special exception, pursuant to §59-G-2.58 of the Zoning Ordinance, to construct an unmanned wireless telecommunications facility on a 120-foot tall monopole topped by a 4 foot lightning rod, and an associated equipment area, at 22611 Georgia Avenue, Brookeville, Maryland.

The site is on Parcel P253, which is a 41.74 acre site owned by co-Applicant Sunshine Farms, LLC (Tax Account Number 00709950). The subject site is in the RC Zone, which permits telecommunications facilities by special exception. The Montgomery County Transmission Facility Coordinating Group (TFCG), also known as the “Tower Committee,” reviewed the application, and on May 4, 2011 voted to recommend approval of the facility, conditioned upon the applicant meeting screening requirements and obtaining a special exception from the Board of Appeals. Exhibit 7.

On June 6, 2011, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on September 16, 2011. Exhibit 12. Technical Staff at the Maryland-National Capital Park and Planning Commission, in a report filed on September 13, 2011, recommended approval of the special exception, with conditions (Exhibit 20).¹

A public hearing was convened as scheduled on September 16, 2011, and Petitioners called four witnesses. The only other participant at the hearing was Joshua Hockstra, an abutting land owner, who testified in opposition. The record was held open until October 13, 2011, so that Petitioners could file minor revisions to their Site and Landscape Plans, ensuring appropriate screening, and submit them to Technical Staff and Mr. Hockstra for their review. Tr. 223-224. The revised Plans were timely filed, and after receiving comments from the Hearing Examiner and

¹ The Technical Staff report is frequently quoted and paraphrased herein.

Technical Staff, Petitioners further amended the Plans, filing them (Exhibit 40(a)) on October 12, 2011. The record closed, as scheduled, on October 13, 2011.

Although Mr. Hockstra raised legitimate concerns about the visibility of the proposed tower, the Hearing Examiner finds that the proximity of the site to existing Pepco high-voltage power lines makes the tower's visibility less imposing on the area. As will appear more fully below, Petitioners have met all the requirements for the special exception they seek, and the Hearing Examiner recommends that it be granted, with conditions specified in Part V of this report.²

II. FACTUAL BACKGROUND

A. The Subject Property and the General Neighborhood

As noted above, the address of the subject property is 22611 Georgia Avenue, Brookeville, Maryland. The special exception site is located on a property (Parcel P253) owned by co-Applicant, Sunshine Farms, LLC. The Club's property is an irregularly shaped parcel, consisting of 41.74 acres in the Rural Cluster (RC) Zone. Parcel P253 is located on Georgia Avenue, about 2,000 feet north of the crossroads community of Sunshine, at the intersection of Georgia and New Hampshire Avenues. Technical Staff reports (Exhibit 20, p.2):

... The farm consists of a house and a number of outbuildings. The owners cultivate two large fields along Georgia Avenue and Triadelphia Lake Road, which bounds the farm to the north, about 20 acres. To the east, along Triadelphia Lake Road, are one-family houses. To the north is land owned by the Washington Suburban Sanitary Commission, part of its holdings along Triadelphia Reservoir. To the south is a Pepco high voltage transmission line.

² Technical Staff noted that the Department of Permitting Services has recently issued a civil citation to Sunshine Farm LLC, for allegedly using the land for outdoor storage of vehicles, which is not a permitted use in the RC Zone. Exhibit 20, p. 4. However, Staff also indicates that "No impermissible activities are occurring on the part of the property that is part of this petition." Exhibit 20, p. 5. As stated by the Hearing Examiner at the hearing (Tr. 10; 206-208), review of the violation notice is not before this body, and it would therefore be improper to make a finding with regard thereto; however, the Board of Appeals routinely conditions its special exceptions on compliance with all applicable laws and regulations, so the land owner, which is also a Petitioner in this case, would be expected to act in accordance with that condition, if the Board grants a special exception in this case.

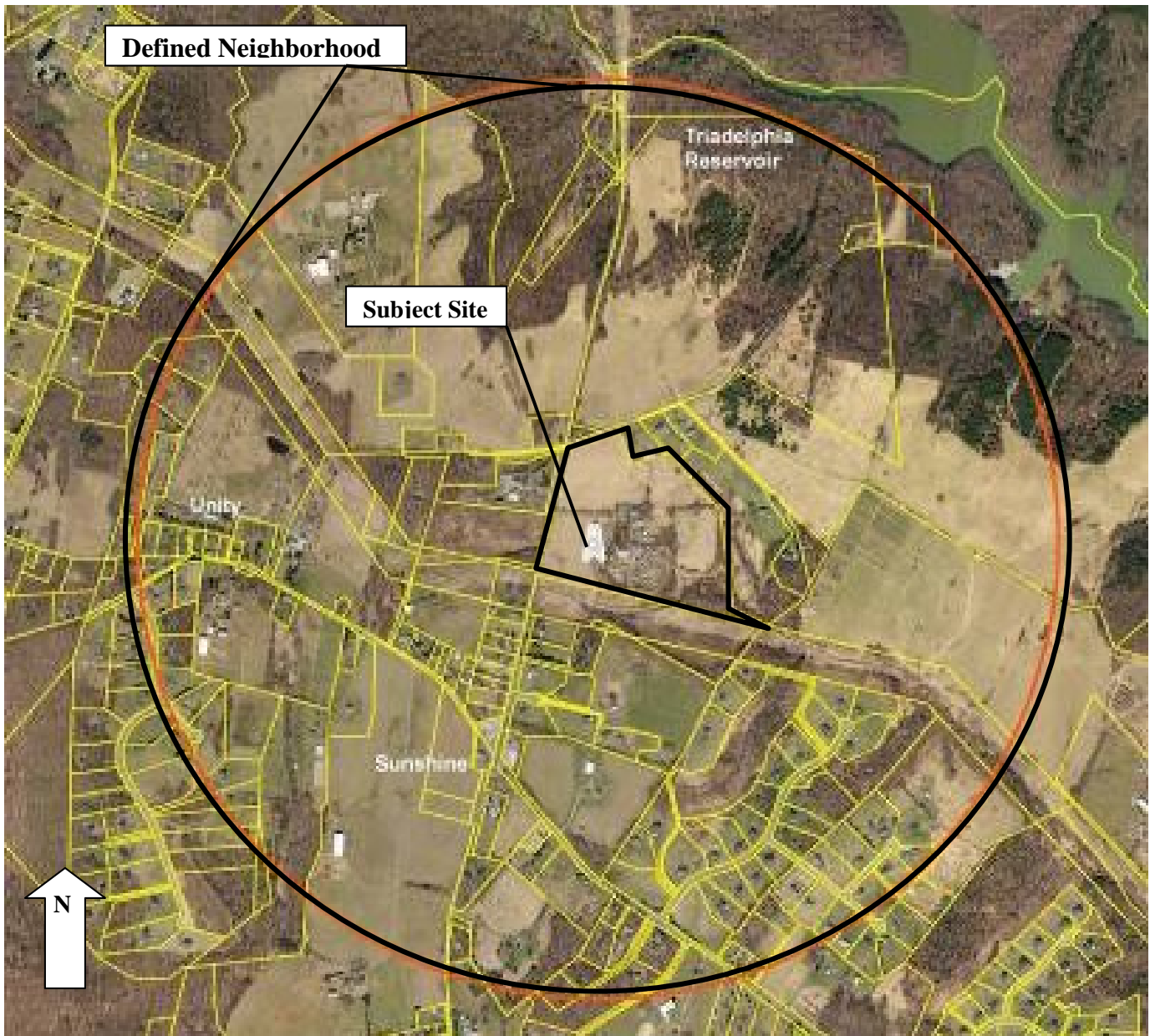
These features are shown in the following aerial photo from the Staff report (Exhibit 20, p. 2):



The property is in the Patuxent River watershed and is part of the Patuxent Primary Management Area (PMA). Although a stream traverses a portion of Sunshine Farms, there are no streams or wetlands within the Limits of Disturbance for the proposed facility. Exhibit 20, p. 7.

Technical Staff defined the general neighborhood as “the general area from which the proposed tower can be seen.” Exhibit 20, p. 3. Staff therefore imposed a circle with a radius of about 4100 feet, as shown in the following aerial photo, encompassing the majority of the area from

which the proposed facility would be visible (Exhibit 20, p. 3):



Petitioners did not dispute this definition of the general neighborhood, and the Hearing Examiner accepts it as well. According to Technical Staff (Exhibit 20, p. 3), “[m]uch of the area to the north of this neighborhood . . . is forest, which would significantly limit views. To the south, this area encompasses the crossroads hamlet of Sunshine. To the west, the area includes the hamlet of Unity at the intersection of Damascus and Sundown roads. To the east, the viewing area

includes residences along New Hampshire Avenue. There are farms and one-family homes in the neighborhood, as well as undeveloped land managed by WSSC as part of the Triadelphia Reservoir.” In addition, significantly, the 130-foot tall Pepco high voltage transmission lines are immediately to the south of the Sunshine Farms. They are depicted below in a recent photo produced at the hearing (Exhibit 31). The photo was taken from across Georgia Avenue, looking east, so it depicts the Pepco lines just south of the Sunshine Farms:

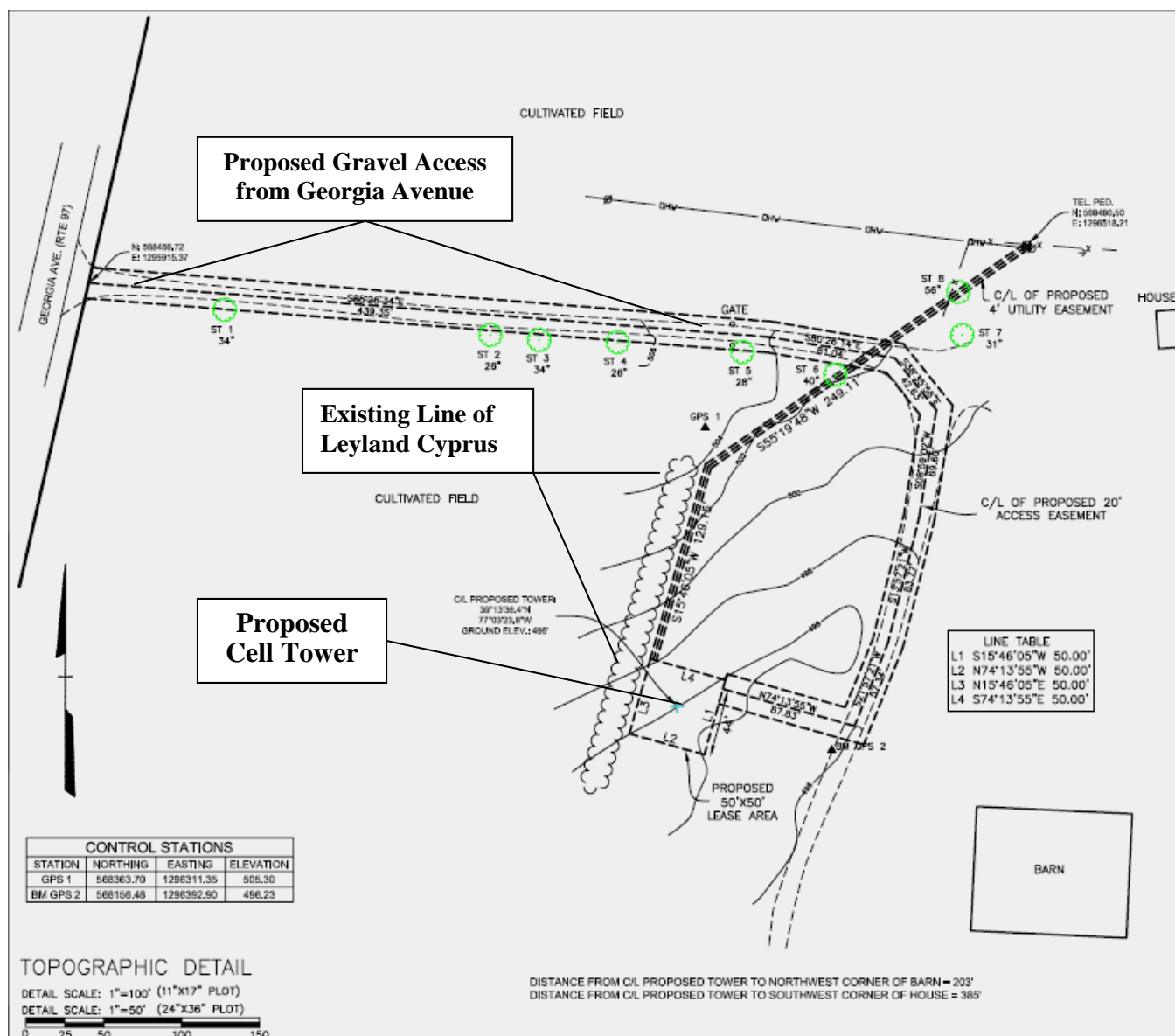


Technical Staff reports only one other special exception in the neighborhood, a lawn care firm directly across Georgia Avenue that holds special exception S-1713. Exhibit 20, p. 11.

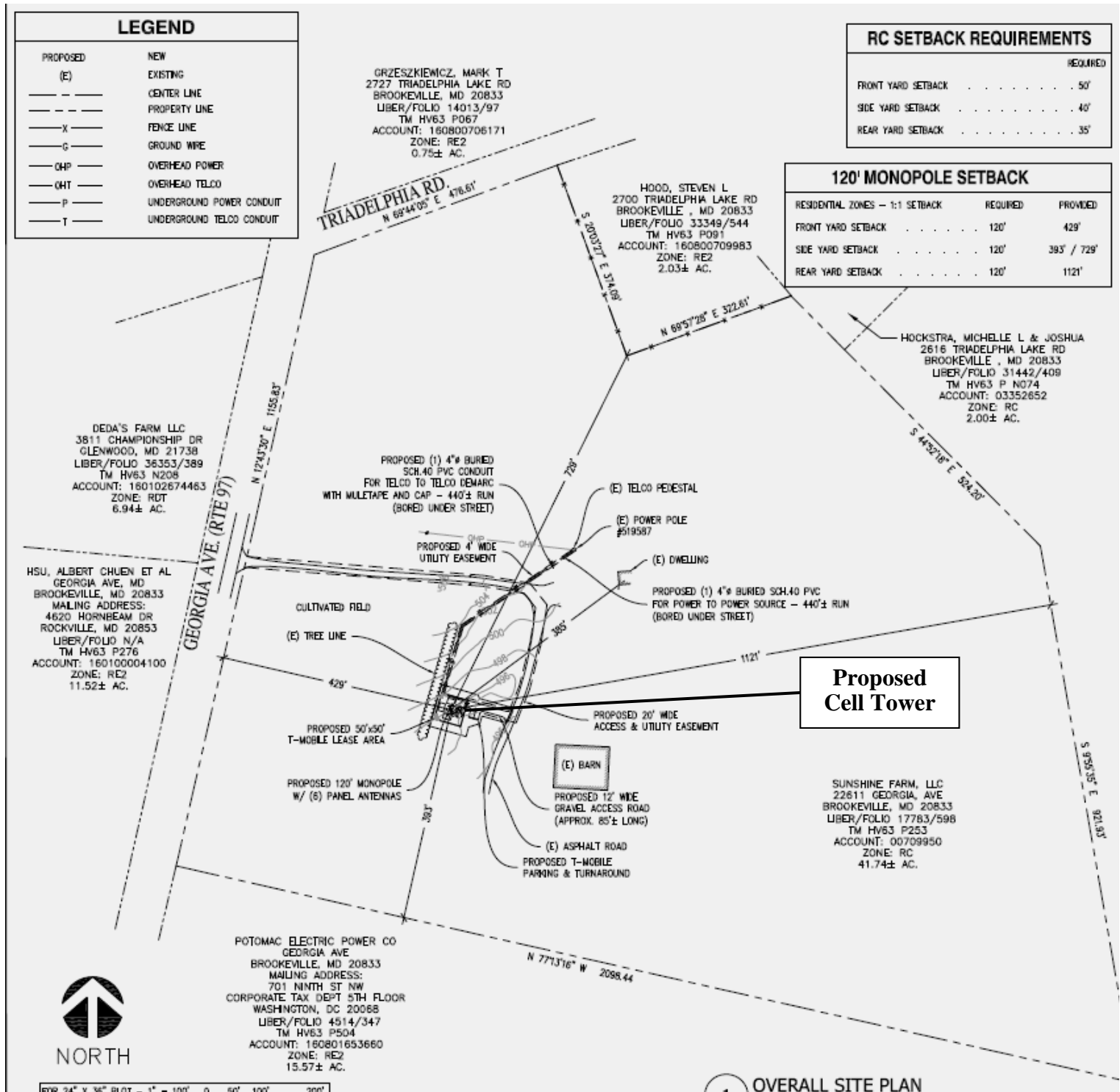
B. The Proposed Use

The proposed use is an unmanned wireless telecommunications facility, with a 120-foot monopole, topped by a 4 foot lightning rod. The monopole and related equipment will be contained

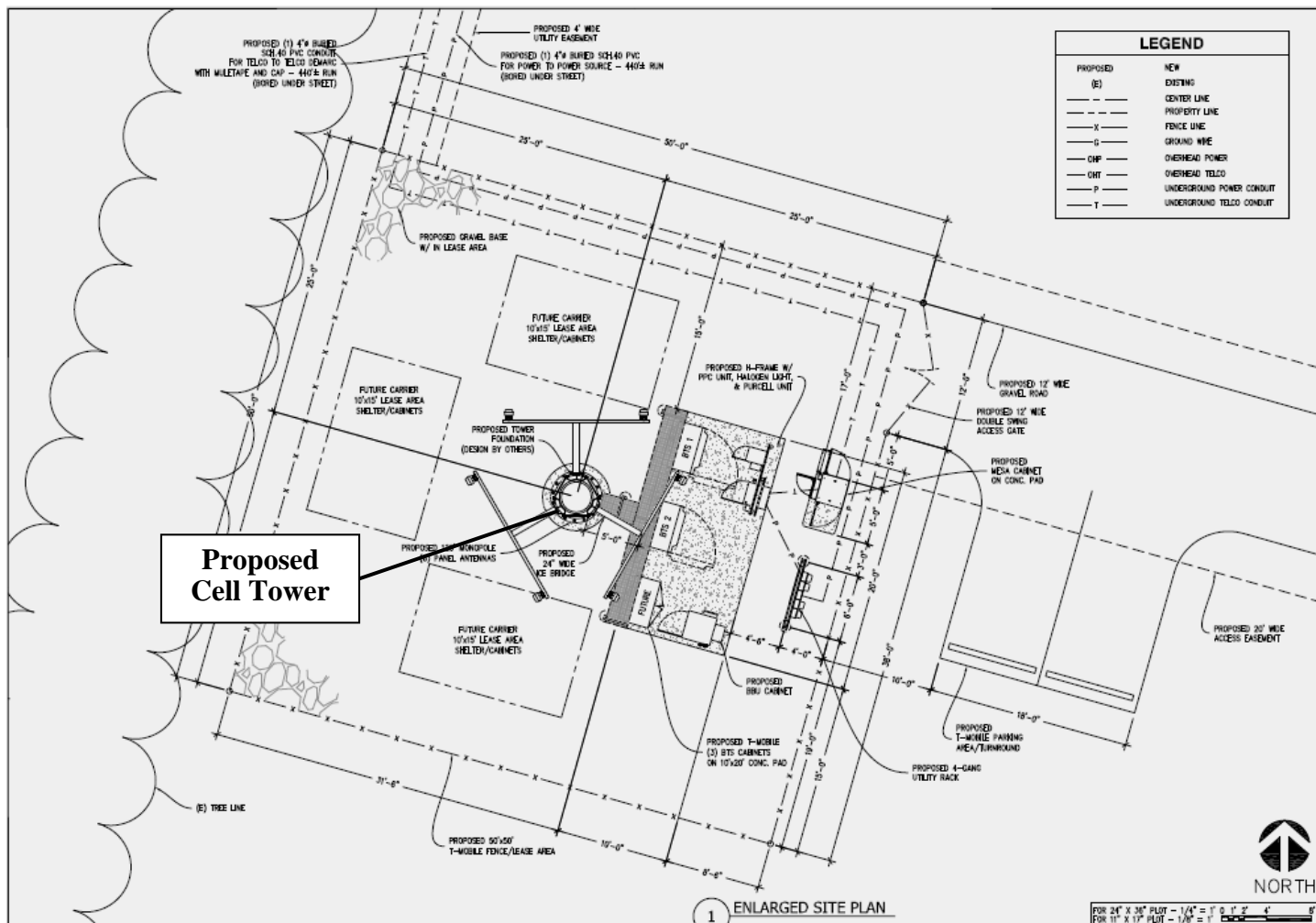
within a 2,500 square-foot fenced compound (50 feet by 50 feet). Two radio base station equipment cabinets will be placed on a 10-foot by 20-foot concrete pad within the proposed compound. The proposed equipment cabinets measure approximately 63 inches high, 51 inches wide, and 37 inches deep. A third cabinet may be added in the future. Tr. 44-57. In fact, the site plan ((Exhibit 40(a)(4)), indicates space for a proposed “BBU Cabinet” and a PPC (Power Protection Cabinet) on the concrete pad. Also within the compound, but not on the concrete pad, will be a proposed “Mesa” cabinet, which is part of the equipment used by the facility, and space for three additional carriers. Portions of the six-page site plan (Exhibit 40(a)) are reproduced below and on the following pages.



Access to the proposed tower site, which has been leased from Sunshine Farms, LLC (Exhibit 8), will be from Georgia Avenue, through an access easement and an 85-foot long, 12-foot wide, gravel driveway, as shown on the above Topographical Detail. Exhibit 40(a)(2). Below is the Overall Site Plan (Exhibit 40(a)(3)):

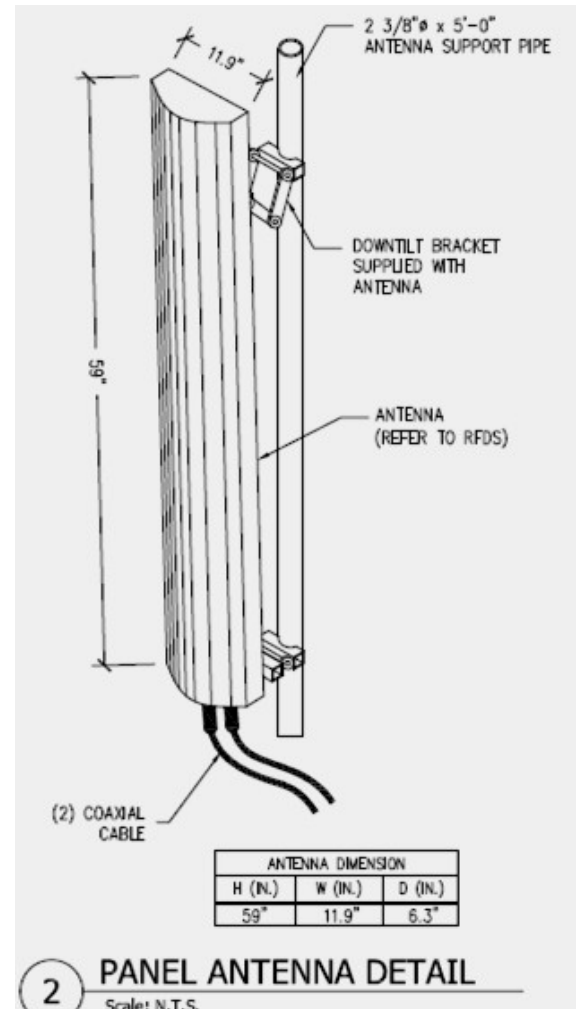
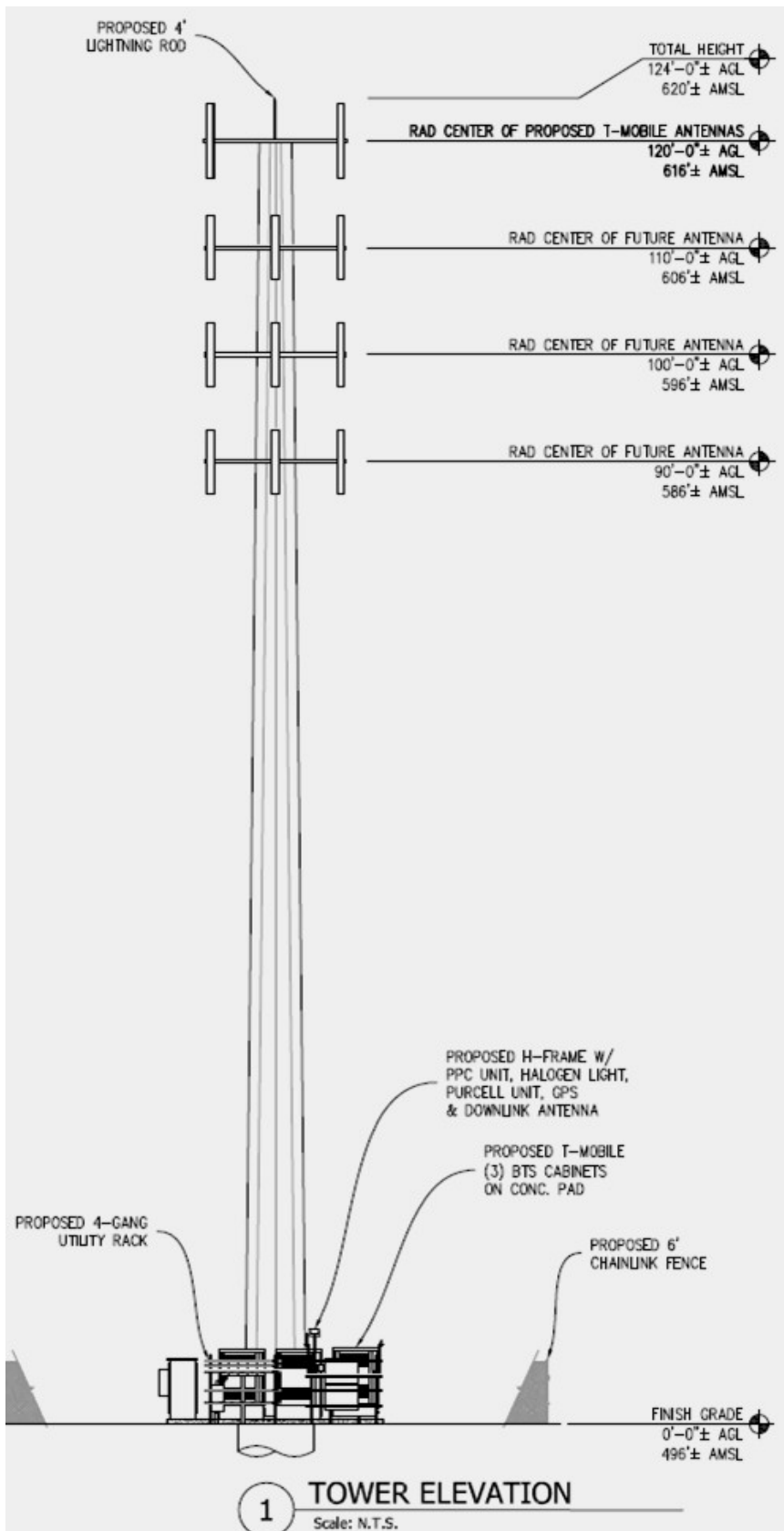


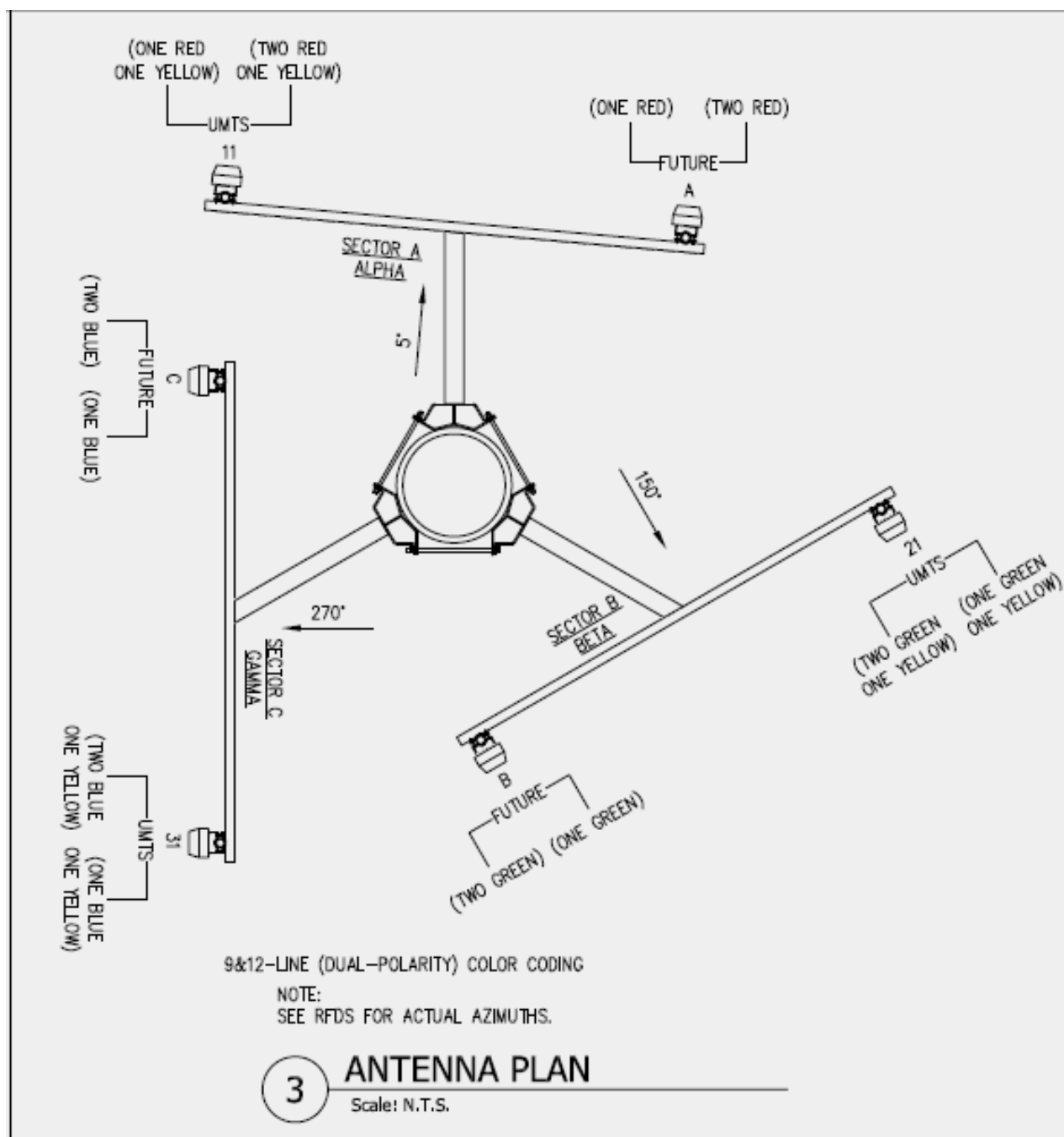
The Enlarged Site Plan (Exhibit 40(a)(4)) is reproduced below:



ANTENNA AND COAXIAL CABLE SCHEDULE										
SECTOR	ANTENNA #	ANTENNA	AZIMUTH	CENTER-LINE	COAXIAL CABLE LENGTH	COAXIAL CABLE	MINIMUM BENDING RADIUS	TMA TYPE	MECH. DOWN TILT	ELEC. DOWN TILT
ALPHA	11	TMBXX_6516_R2M	5°	120'	130'	(2) 1 5/8"Ø	20"	KRY 112 144/1	0°	2°
	A									
BETA	21	TMBXX_6516_R2M	150°	120'	130'	(2) 1 5/8"Ø	20"	KRY 112 144/1	0°	2°
	B									
GAMMA	31	TMBXX_6516_R2M	270°	120'	130'	(2) 1 5/8"Ø	20"	KRY 112 144/1	0°	2°
	C									
TOTAL LENGTH FOR (12) LINES					1560'	*ESTIMATED LENGTH - CONTRACTOR TO FIELD VERIFY				

The following three diagrams are from the Elevation and Antenna Details (Exhibit 40(a)(5)):

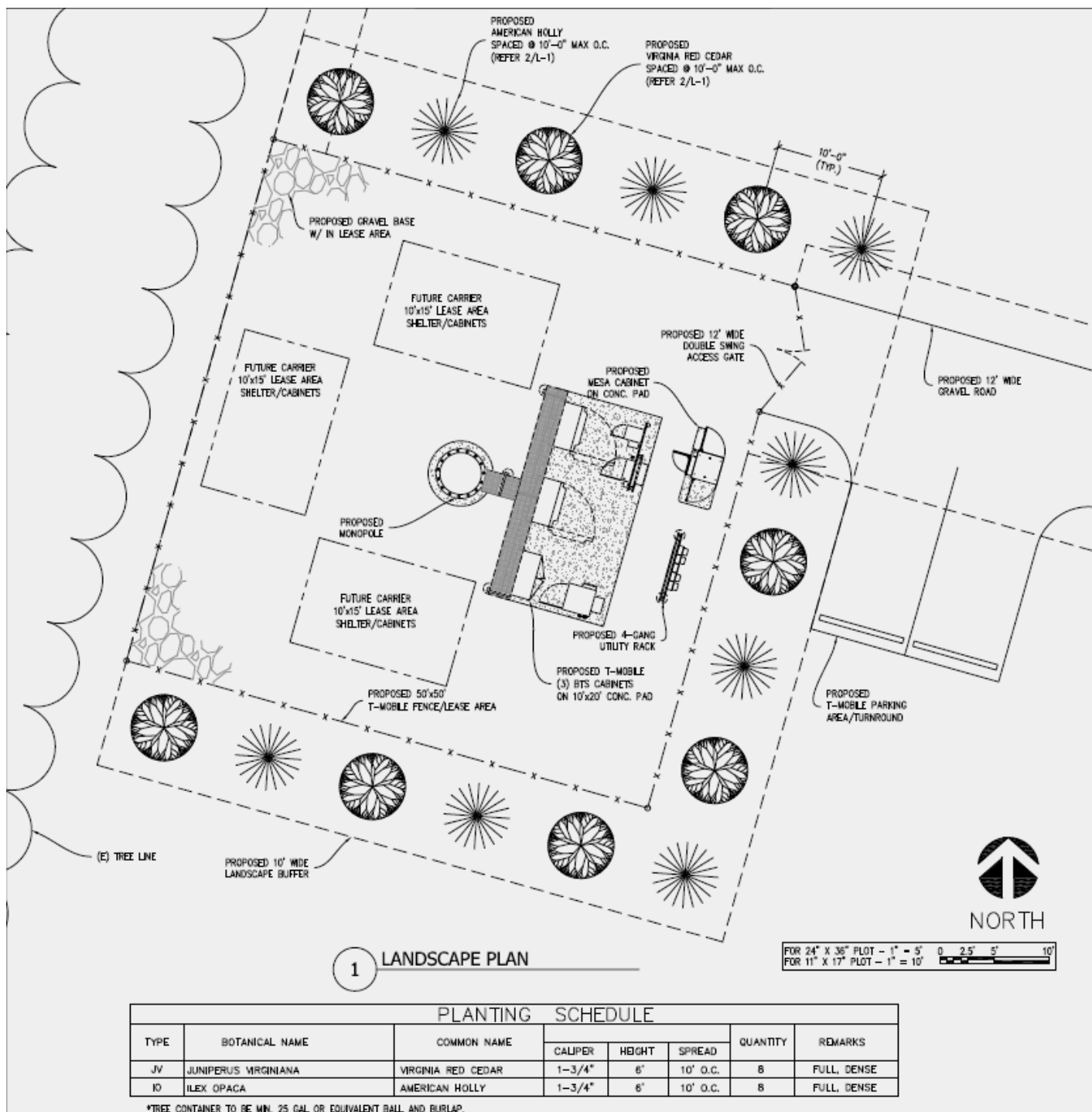




As shown, panel antennas will be mounted outside of the monopole at a centerline height of approximately 120 feet, and will stretch up to a level just below the top of the 4-foot lightning rod mounted on the cell tower. The proposed facility will be constructed with sufficient capacity to hold the antennas of at least three other communication carriers (co-locators) in addition to the antennas

of T-Mobile. Exhibit 3, p. 1.

The equipment compound will be surrounded by a six-foot tall chain-link fence, and a combination of Virginia Red Cedar and American Holly trees (both of which are native species, in accordance with Technical Staff's recommendation (Exhibit 39)), planted at a height of at least six feet, as shown on the following Landscape Plan (Exhibit 40(a)(6)):



Although the facility will be unmanned, it will be in continuous operation 24 hours per day. The only visits to the site will be for emergency repairs or occasional trips for maintenance purposes, typically less than one visit per month. Exhibit 3, p. 2. There will be no lighting at all on the facility except an emergency lamp attached to one of the equipment cabinets for a technician to service it in the dark. The tower itself will not be lighted. Tr. 44-57.

The proposed tower site abuts a line of existing, mature Leyland Cypress trees, approximately 40 feet tall, on the west.. Tr. 180-181. Technical Staff reports that the site is exempt from submitting a forest conservation plan under Chapter 22A-5 of the County Code. Exhibits 6 and 20, p. 7. As previously noted, the property is part of the Patuxent Primary Management Area (PMA); however, Technical Staff indicates that “[t]he project proposes no development within the 660-foot PMA buffer for Patuxent River tributaries.” Exhibit 20, p. 7.

The proposed monopole will contain no signage except a sign no larger than 2 square feet affixed to the support structure or equipment shelter to identify the owner and maintenance service provider, as required by Zoning Ordinance §59-G-2.58(a)(8). The cell tower will be set back 429 feet from the nearest public road, which is Georgia Avenue.

Zoning Ordinance §59-G-2.58(a)(2)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of 300 feet from the nearest off-site dwelling, which is more than met in this case. Applicants’ site designer, Jacob Goralski, testified that it is approximately 625 feet to the nearest home. This distance was not noted on the plans because the distance from the proposed tower to the nearest property line (on the south) is more than the 300-foot minimum (393 feet), which is shown on the plans. Tr. 42.

In addition, Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the total height of 124 feet for the cell tower and lightning

rod, a 124 foot setback from each property line is required. This setback is easily met on all sides. As shown on Exhibits 40(a)(2) and (3), it is 393 feet from the southern property line (Pepco easement); 429 feet from the western property line (Georgia Avenue); 729 feet from the northern property line; and 1121 feet from the eastern property line. Tr. 41.

The equipment shelters house the electronics for the structure and backup batteries. T-Mobile will use a NorthStar battery. The EPA classifies NorthStar NSB 100-FT battery as spill proof. Exhibit 30 contains the specifications sheet for NorthStar batteries and a fact sheet that describes the chemical safety information with regard to the radio base station cabinets used in T-Mobile sites. It states that T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. According to T-Mobile's statement, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment throughout an extreme range of operating conditions.

Hillorie Morrison, who acts as T-Mobile's agent for purposes of zoning, introduced an affidavit from William O'Brien, who is the real estate manager at T-Mobile, testifying that T-Mobile, when it installs the tower, will register any batteries in the County's high-use facility registration program. Exhibit 29.

C. Impact of the Proposed Facility on the Neighborhood

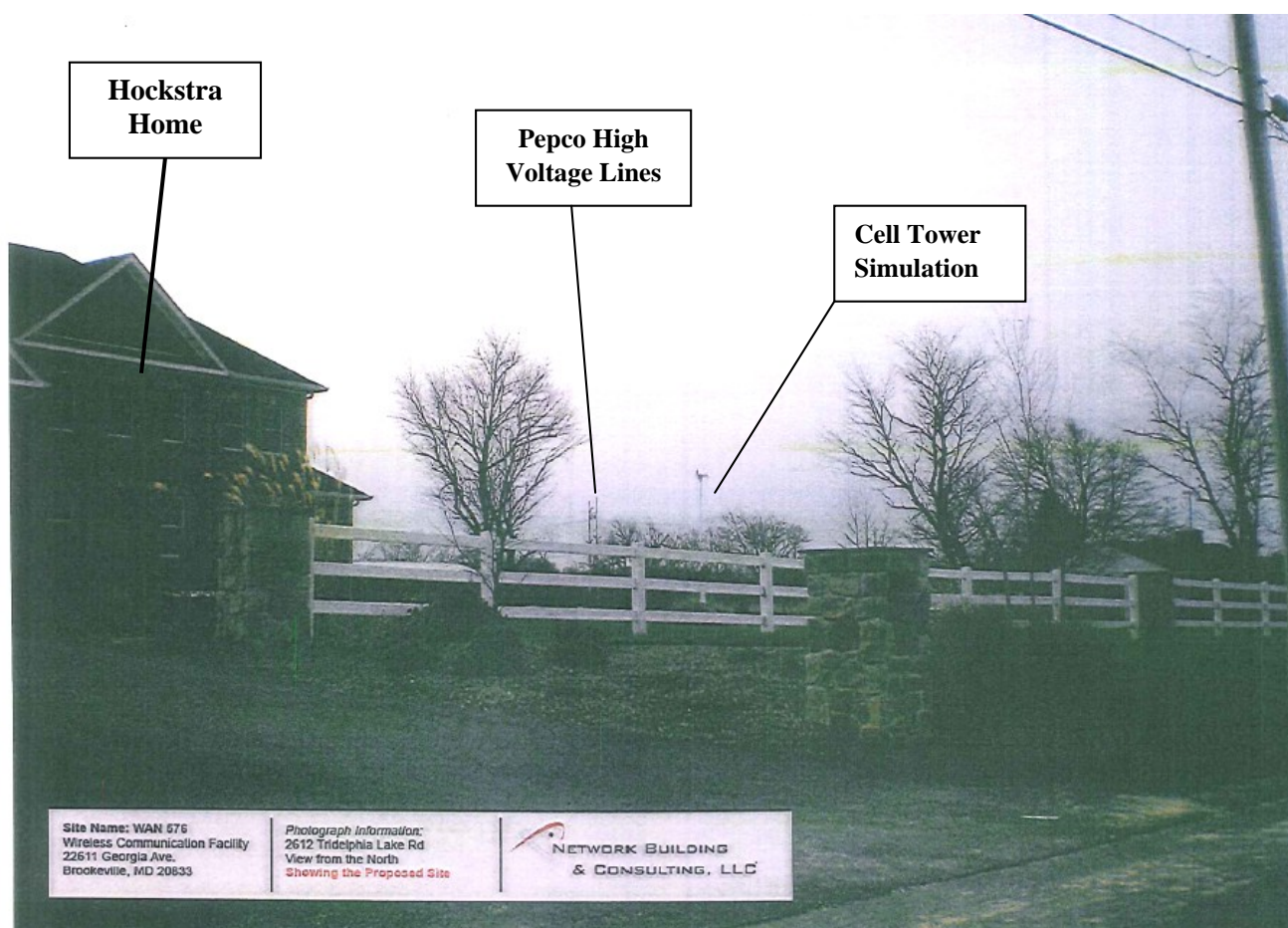
The most significant issue regarding a telecommunications facility in an agricultural zone is its potential visual impact upon the neighbors and on the rural vista. No community groups or individuals contacted Technical Staff about this proposal (Exhibit 20, p. 9), and only one person opposed the petition before the Hearing Examiner. That person, Joshua Hockstra, lives at 2612 Triadelphia Lake Road in Brookeville, and he is an abutting neighbor to the northeast, as can be seen

on the site plan reproduced on page 8 of this report.

Mr. Hockstra testified at the hearing (Tr. 211):

As an adjacent property owner, I do not see the need for a cell tower in my backyard. I built this house because of the pristine views and beautiful horizons. If I knew a cell tower was going to be built in my backyard, I would never have bought the property and built my house here. Brookeville is a historical town in a rural setting and this will be a visual pollutant to all the people that pass through it and enjoy the Triadelphia Lake recreational area.

Exhibit 10(f) is a photograph which depicts Mr. Hockstra's home, with the Pepco lines and the simulated cell tower (at a distance of about a quarter of a mile) shown in the background. Tr. 212.



Although the cell tower will be in his view, on cross-examination Mr. Hockstra indicated that the Pepco lines and telephone poles were already there when he purchased the land. Tr. 215-217.

Those Pepco towers are also clearly in his view. Mr. Hockstra would prefer if the proposed cell tower were located closer to the Pepco towers, but moving the location further to the south would make the compound and the tower more visible from Georgia Avenue because there is existing screening at the present location from a dense layer of 40-foot tall Leyland Cypress trees. Tr. 180-181.

While the Hearing Examiner understands Mr. Hockstra's concern about his view, the addition of a 120-foot tall cell tower a quarter of a mile from his home against the backdrop of the 130-foot tall Pepco high-voltage lines should make a relatively small impact.

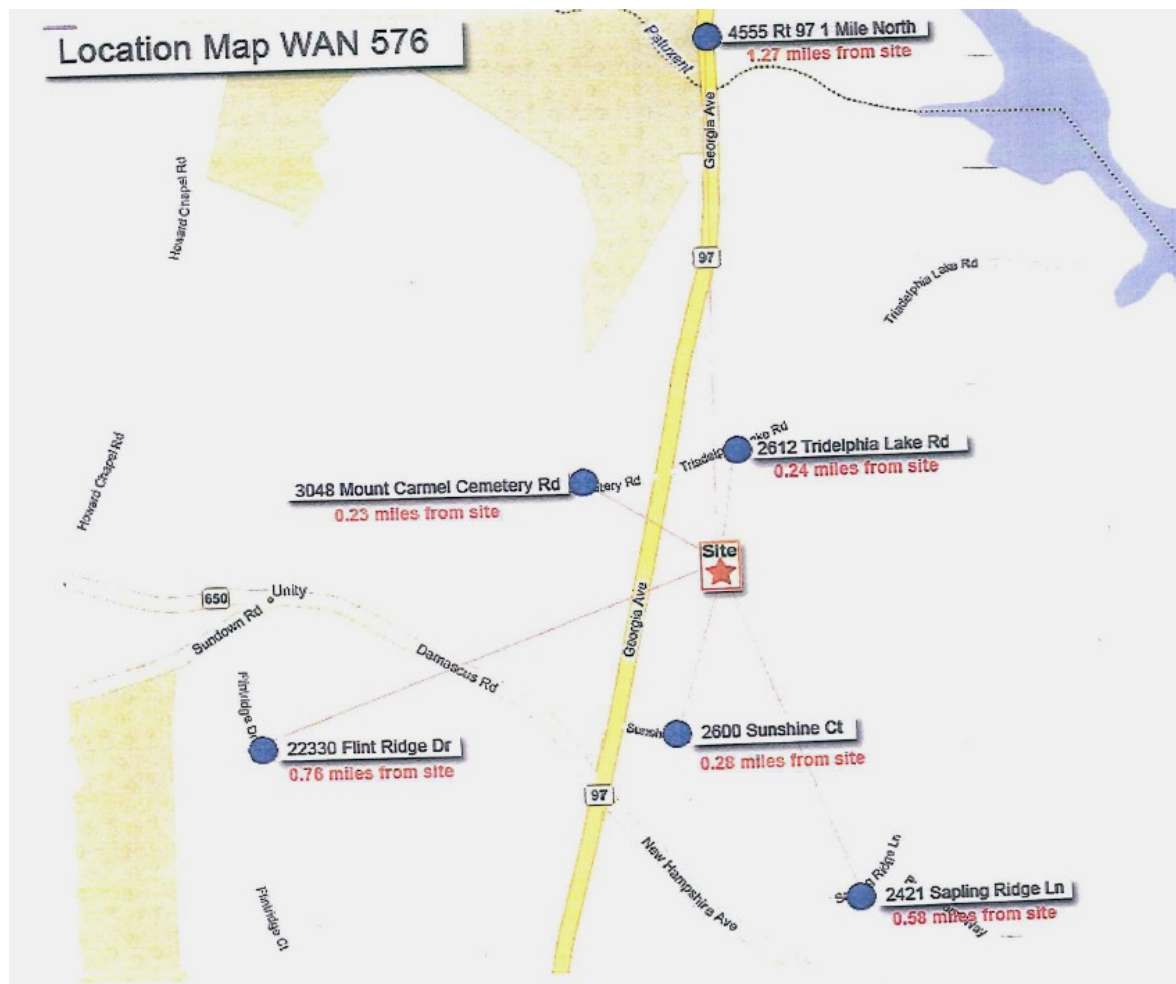
Mr. Hockstra also expressed a concern about the possible impact of the proposed cell tower on property values of his home. Applicants met this concern with expert testimony from a licensed real estate appraiser, who has studied this issue. Oakleigh J. Thorne is a certified general real estate appraiser in the State of Maryland and a member of the Appraisal Institute.

Mr. Thorne testified that multiple studies have indicated that the presence of a cell tower does not diminish property prices of nearby residences, and in some instances people may be willing to pay a premium to get better internet access near a cell tower. Tr. 88 and 101. He found no evidence that sellers or buyers of homes within the visual impact area either discounted the price or experienced extended marketing periods to execute a sale due to the visual presence of a communication device. According to Mr. Thorne, there are studies by the Appraisal Institute or articles that have been published by the Appraisal Institute that are consistent with his findings. Tr. 80-101. Mr. Thorne further testified that he is familiar with this proposed site and the area, and that the proposed cell tower would not, in his opinion, lower sales prices of houses in the area. Tr. 91-94.

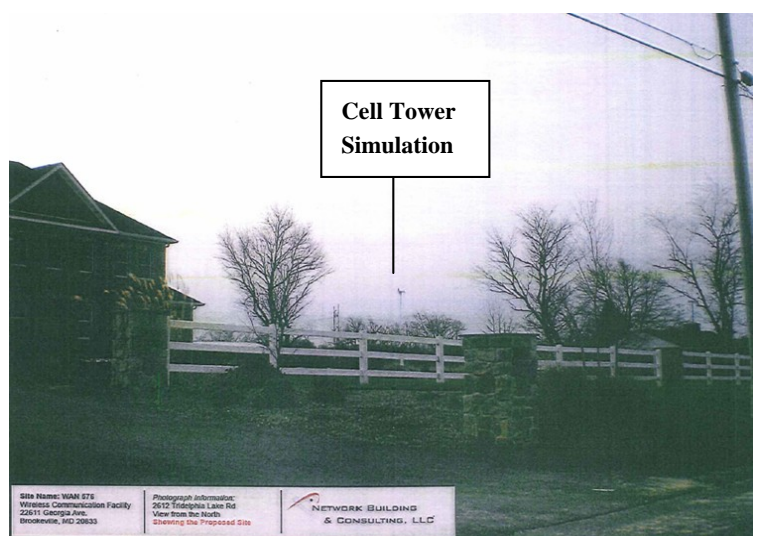
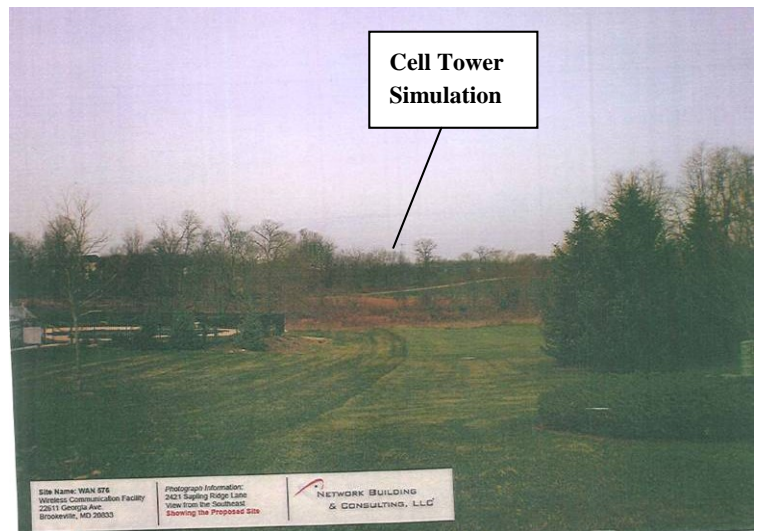
Mr. Hockstra's fears are not supported by any expert evidence, and they are clearly outweighed by the expert testimony given by Mr. Thorne in this case. As stated in *Moseman, v. County Council Of Prince George's County*, 99 Md.App. 258, 265, 636 A.2d 499, 503 (1994), citing

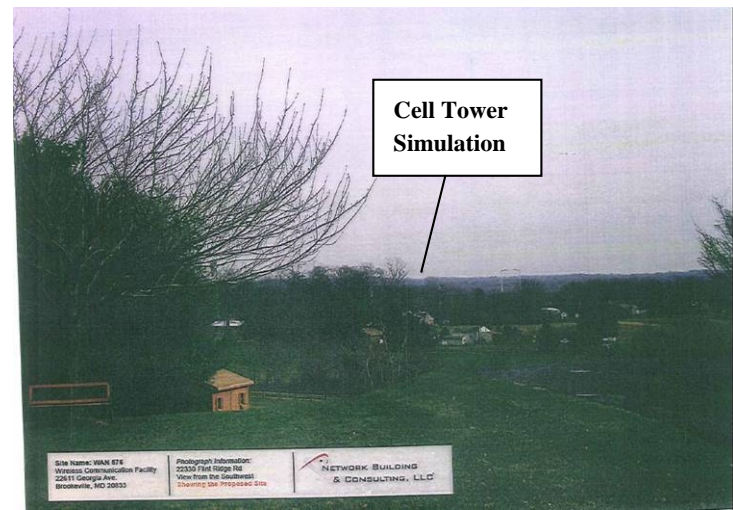
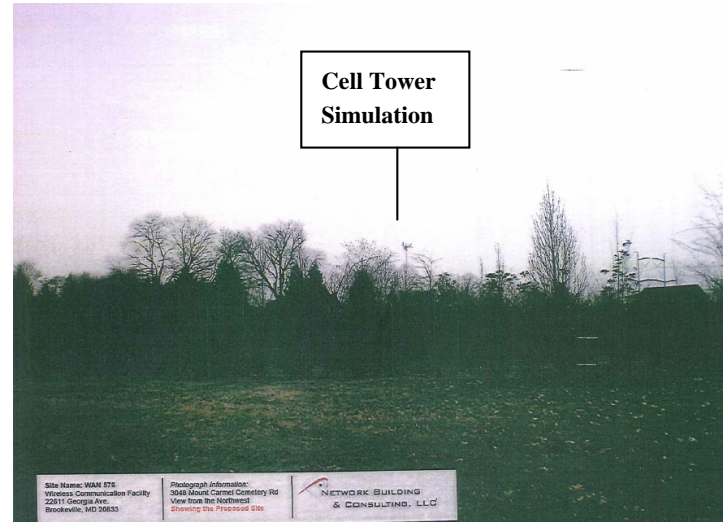
Rockville Fuel v. Board of Appeals, 257 Md. 183, 191-93, 262 A.2d 499 (1970), “A denial of a special exception based solely upon generalized fears or unsupported allegations of adverse effect is arbitrary and legally unwarranted.”

The general impact of the proposed cell tower on the views throughout the area was discussed at some length in these proceedings. Ms. Morrison testified that when T-Mobile erects a new monopole, it does a visual test, using a red balloon (about three feet in diameter) raised to the height of the proposed monopole, 120 feet in this case. Visibility is examined at various points around the site. T-Mobile then simulates what the actual monopole would look like based on the 120 foot height and the style of the pole, as shown in photographs. The location map marked “WAN 576” is Exhibit 10(a), and it is reproduced below:

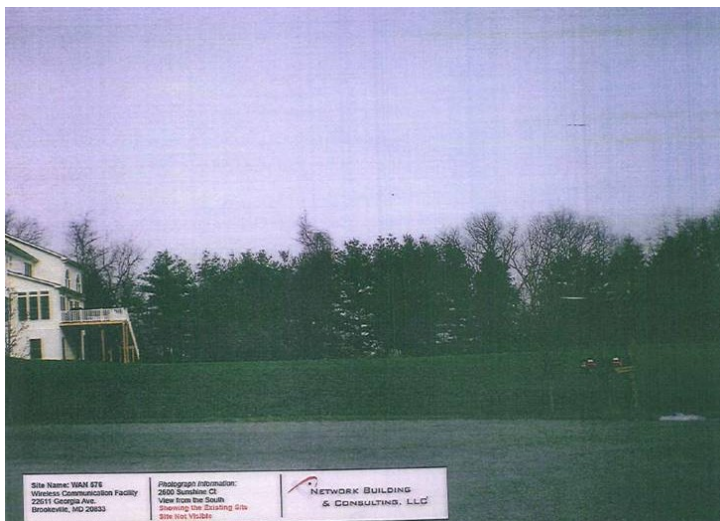


The tag “WAN 576” pertains to this particular transmission tower. The red star in the center shows the location of the monopole based on its coordinates. The various blue dots show the point where Ms. Morrison stood to take the picture, looking towards the site, and underneath in red, it shows how far that point is from the site. These photographs depict the site as one would see it from the location that's indicated on the photograph. Tr. 172-174. The following photographs on the left depict the site as it exists, viewed from the locations indicated on the photographs, and the photographs on the right depict the site as one would see it with the proposed monopole erected:





In the photos from the following two locations, the balloon was not visible, so no tower simulation was produced.



Ms. Morrison noted that in some of the photos, telephone poles can be seen, and in others, the nearby Pepco transmission towers, which are 130 feet tall, are also visible. Tr. 174.

T-Mobile talked to Pepco about potentially co-locating its antennas on the Pepco towers close to this proposed facility, but since this particular transmission facility carries very high voltage lines, they would not permit T-Mobile to locate antennas at the top of their towers. Pepco did say Applicants could locate 20 feet below all the equipment that is on their poles, but that height would not meet T-Mobile's transmission coverage needs. Tr. 174-178. T-Mobile considered other possible sites, but couldn't find any other structures tall enough. This particular application does not require any setback waivers. Tr. 178.

Technical Staff made the following comments regarding visibility of the proposed monopole (Exhibit 20, p. 6):

. . . The proposed monopole is located behind a stand of mature Leyland Cypress trees, and will have no lighting or extensive parking areas. Its scale is similar to that of the adjacent Pepco high-voltage transmission lines, and will have a visual impact that is virtually identical to the towers supporting those lines.

Staff also noted that the proposed monopole will not have other adverse effects on the community (Exhibit 20, p. 10):

. . . The immediate vicinity is dominated by a high-voltage electric transmission line that crosses Georgia Avenue and is visible from substantial distances. The scale, design and bulk of the proposed monopole are similar to those of the transmission towers, as is the intensity and character of the use. Because the facility is unmanned, like the Pepco transmission lines, it will not regularly generate traffic and needs little parking. There are likely to be other monopoles in the general area, but cellular telephone technology does not require similar monopoles in the immediate vicinity. The ability of this monopole to accommodate other carriers also will limit the number of similar facilities in the immediate area.

Finally, T-Mobile asserts in its Statement in Support of this application (Exhibit 3, p. 1), that "T-Mobile holds a license issued to it by the Federal Communications Commission ("FCC") to provide personal communication service ("PCS") throughout the greater Baltimore-Washington, DC

metropolitan areas, including all of Montgomery County.” Petitioners’ radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license regarding radio frequency emissions. Tr. 142-143.

The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

For the reasons discussed herein, the Hearing Examiner finds that although the proposed monopole will be visible in the neighborhood, it will have no non-inherent adverse effects on the surrounding community.

D. The Master Plan

Petitioners’ property is located in the area subject to the 2005 Olney Master Plan. Technical Staff notes that the property is in the Rural Cluster Zone, and the purpose of the RC Zone is to enable “a compatible mixture of agricultural uses and low-density residential development to promote agriculture....” Exhibit 20, p. 6. Staff states (Exhibit 20, p. 6):

. . . [the proposal] does not conflict with recommendations designed to limit commercial uses to existing areas zoned for those purposes. In addition, it is not proposed for an area currently used for farming, so no agricultural land will be lost as a result of this proposal. Improved mobile communication in this area will serve local residents, farmers and business owners.

The Master Plan does not appear to address telecommunications facilities, as such, but it does have a discussion of special exceptions (Master Pan p. 42):

Special exceptions are specific uses defined in the Zoning Ordinance and may be allowed if they meet the requirements for such uses as set forth in the Zoning Ordinance.

Special exception projects should be compatible with the development pattern of the adjoining uses in terms of height, size, scale, traffic and visual impact of the structures and parking lots. In addition, special exception uses of a commercial nature that do not need large properties and can be located in the Town Center should be discouraged in residential areas, especially along major streets. The section of Georgia Avenue between Norbeck Road and the Town Center especially should be kept free of any large uses that would change its low-density residential character and create pressure to allow other such developments along this stretch. Sites with existing special exception uses may be considered for redevelopment and alternative special exception uses, provided that they are consistent with the Master Plan.

Recommendations:

1. Discourage special exception uses along Georgia Avenue between Norbeck Road and the Town Center to preserve its low-density residential character.
2. Minimize the negative impacts of special exception uses such as non-residential character, visibility of parking lots, excessive size, height and scale of buildings, and intrusive lighting.
3. Discourage special exception uses with excessive imperviousness levels.

Technical Staff found that “The small scale and passive nature of the proposed telecommunications facility does not conflict with master plan recommendations.” Exhibit 20, p. 6. Staff reached this conclusion because the proposed monopole is located behind a stand of mature Leyland Cypress trees, will have no lighting or parking, and will be of a scale similar to that of the adjacent Pepco high-voltage transmission lines. It will therefore have a visual impact that is virtually identical to the towers supporting those lines.

The Hearing Examiner agrees that the subject proposal will not offend the Master Plan guidelines for the reasons stated by Technical Staff. Moreover, Zoning Code §59-C-9.3(f) permits telecommunications facilities by special exception in the RC Zone.

E. Need for the Proposed Facility

T-Mobile is proposing to locate a new telecommunications facility in order to fulfill its service requirements in this area. The Montgomery County Transmission Facility Coordinating Group (TFCG), after reviewing the revised application, determined that the Applicants have a justified need for a new site at the proposed height of 120 feet, and that the height at which Pepco would permit Applicants to co-locate on their nearby towers (*i.e.*, at the 80-foot level), would not permit Applicants to meet their coverage objective. Exhibit 7. It thus recommended approval of the proposed monopole on the subject site, conditioned upon Applicants meeting requirements to screen the equipment area and to obtain a special exception. Exhibit 7.

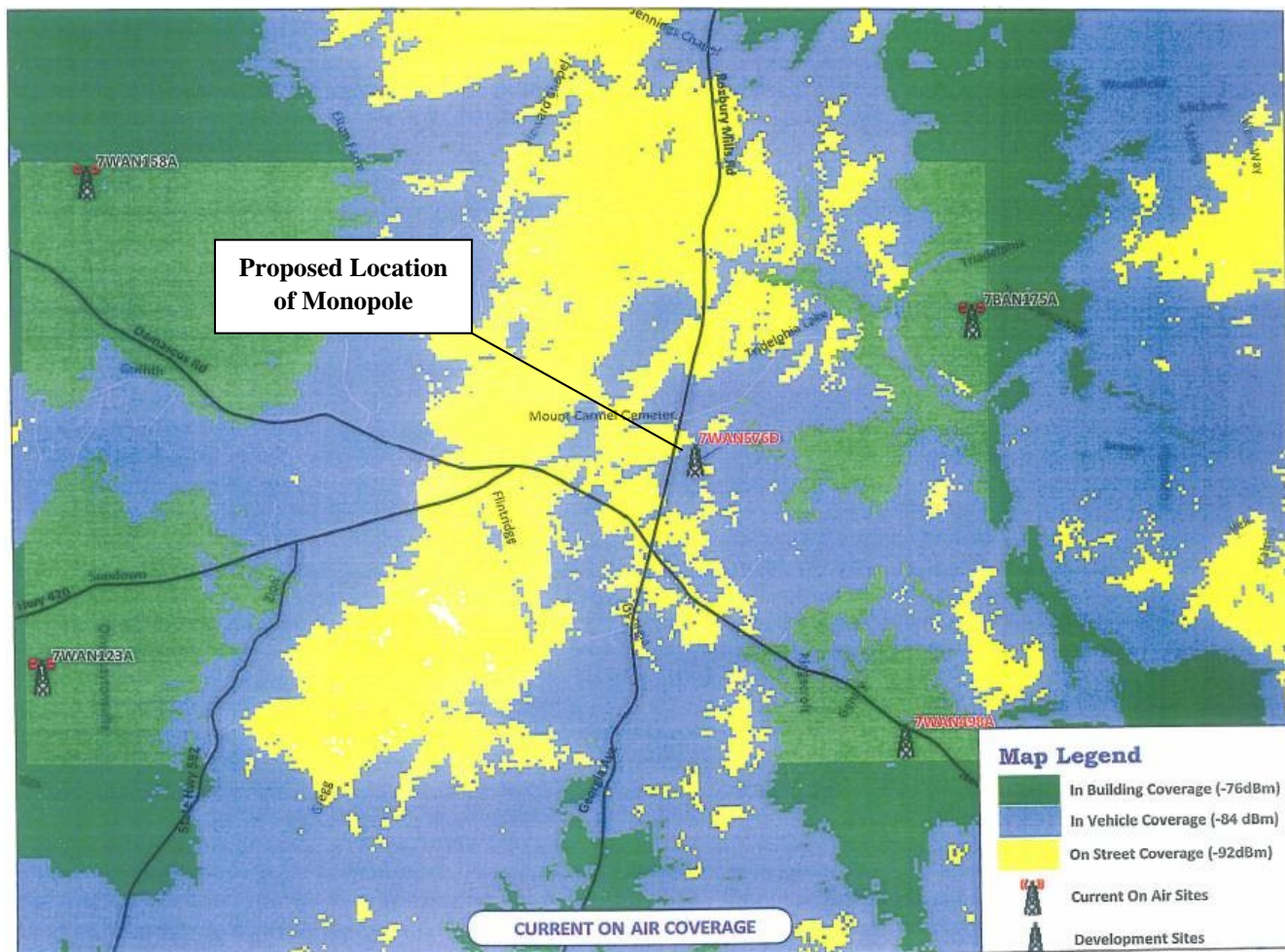
Even though this petition has been recommended by both the Transmission Facilities Coordinating Group and the Technical Staff, the Board of Appeals “must make a separate, independent finding as to need and location of the facility.” Zoning Ordinance §59-G-2.58 (a)(12).

Petitioners presented evidence at the hearing as to both the need for, and the proper location of, the proposed telecommunications facility. That testimony came from T-Mobile’s agent and land use planner, Hillorie Morrison (Tr. 166-209), and from a T-Mobile’s lead radio frequency (RF) engineer for this area, Curtis Jews. Tr. 108-165.

Mr. Jews introduced Exhibit 25, a cell tower vicinity map, showing the proposed wireless facility, which is labeled as “7 WAN 576D Sunshine Farms,” and nearby T-Mobile cell towers. He testified that the area of the proposed facility is in need of improved coverage for voice and also for data. At this time, there is coverage but it is unreliable coverage. Tr. 113.

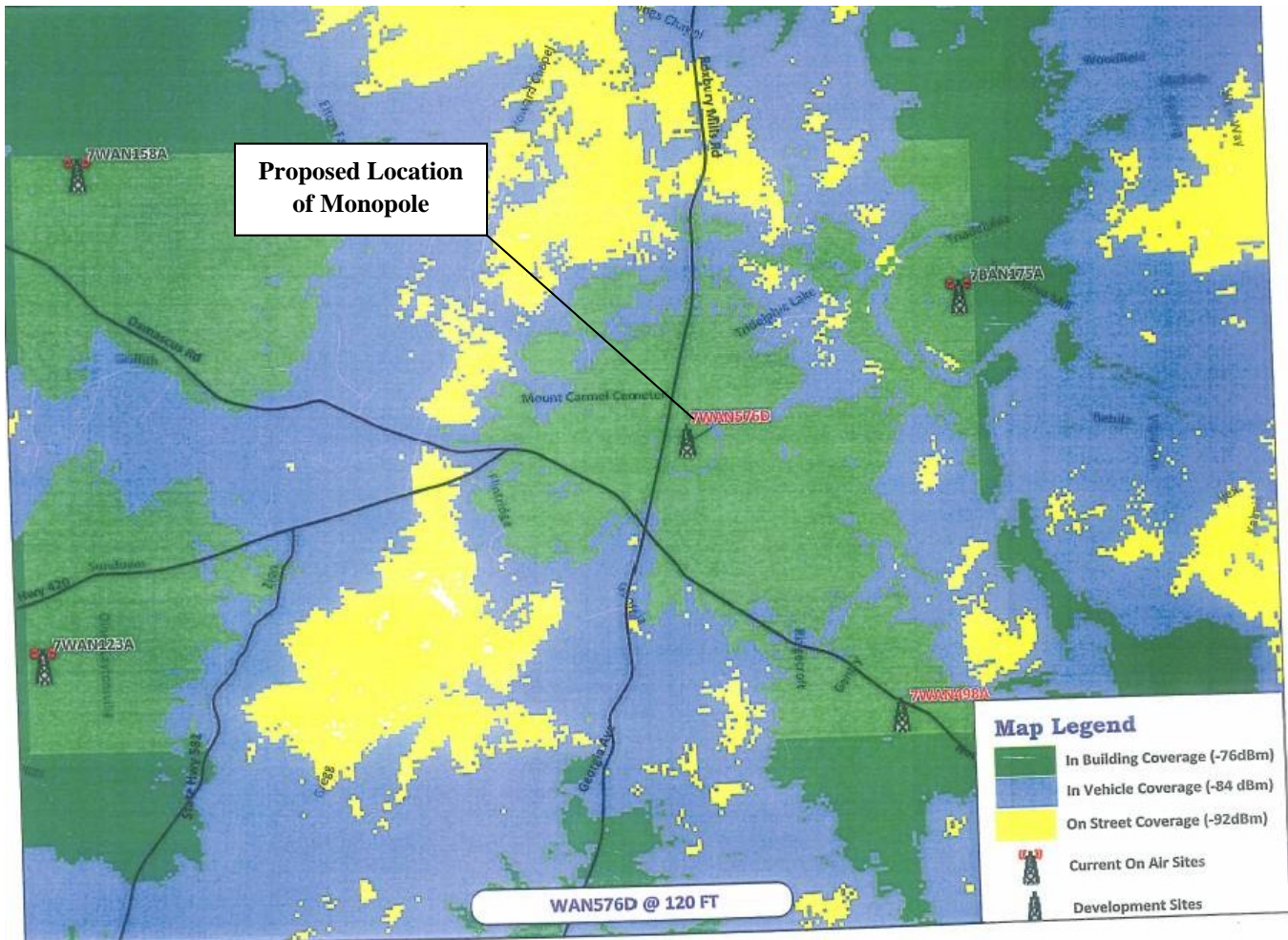
Mr. Jews used two coverage maps, Exhibit 9(a) showing current on-air coverage around the site and Exhibit 9(b), showing expected on-air coverage with the proposed site, WAN-576D, activated. Green is used to show in-building coverage, which is the coverage that one can expect inside of the home. Blue areas denote in-vehicle coverage, and the yellow areas show where there is

only on-street coverage. Tr. 114-115. Exhibit 9(a), showing current coverage, is reproduced below:



The current coverage map, shown above, is created by drive test data that T-Mobile collected and then analyzed using modeling software keyed to the type of area. In the drive study, data collectors have receivers in their automobiles, and they drive around on many roads to collect as many samples as possible to make the data as dense as possible. It shows T-Mobile what signal losses are associated with that area. Tr. 128-132.

As shown in Exhibit 9(a), there is currently a lack of in-building coverage at the subject site, 7 WAN-576D. Exhibit 9(b), which is reproduced on the next page, shows the expected coverage with 7 WAN-576D on air, and there is clearly an improvement in coverage.



As displayed in Exhibit 9(b), where there had been a lot of yellow, which is on-street coverage, and blue, which is in-vehicle, there now is in-building coverage, which is green, and more of the blue in-vehicle coverage. Thus, the new facility would fill in the gap and provide reliable coverage in homes and businesses, with sufficient capacity for Internet, texting and video streaming. Tr. 115-116.

According to Mr. Jews, for the twelve month period from August 2010 to August 2011, 3,429 calls to 911 were made in this sector. Tr. 117-120. Although only one percent of calls were dropped in this time period, Mr. Jews testified that this figure does not reflect the need for data coverage and additional capacity in the system now and in the future. Tr. 121-141.

Mr. Hockstra questioned the need for the tower because some of his workers have T-Mobile service and have coverage in his home. Tr. 218-219. However, this purely anecdotal evidence is far outweighed by the drive studies and coverage maps testified to by Mr. Jews.

As mentioned earlier, T-Mobile talked to Pepco about potentially co-locating its antennas on the Pepco towers very close to this proposed facility, but since this particular transmission facility carries very high voltage lines, they would not permit T-Mobile to locate antennas at the top of their towers. Although Pepco would allow Applicants to locate 20 feet below all the equipment that is on their poles, that height would not meet T-Mobile's transmission coverage needs. Tr. 174-178. Ms. Morrison testified that T-Mobile considered other possible sites, but couldn't find any other structures tall enough, and the present site does not require any setback waivers. Tr. 178.

Ms. Morrison further testified that the proposed cell tower facility will enhance health and safety by improving wireless communication. As you have more antenna sites, it's easier for a 911 responder to find the person who is making the call. Tr. 181-182.

Technical Staff found that "[t]he proposed facility will improve in-building coverage for T-Mobile customers without significant negative impact on adjacent residents." Exhibit 20, p. 15.

There is little probative evidence in the record to contradict the testimony of Ms. Morrison and Mr. Jews, and the Hearing Examiner credits that testimony as being persuasive. Based on that testimony and on the recommendations of the Transmission Facilities Coordinating Group and the Technical Staff, the Hearing Examiner finds that there is a need for the proposed telecommunications facility, and that it is appropriately located.

III. SUMMARY OF HEARING

At the hearing, Petitioners called four witnesses, Jacob Goralski, an expert in site design of telecom facilities; Oakleigh J. Thorne, a certified real estate appraiser; Curtis Jews, a radio frequency

engineer; and Ms. Hillorie Morrison, a T-Mobile project manager and land use planner.

The Hearing Examiner indicated that Technical Staff had reported that the subject site was given a violation notice by the Department of Permitting Services for allegedly storing vehicles on the site, and such storage is not permitted in the RC Zone. The Hearing Examiner noted that that is a separate issue from the proceedings here as to whether this telecommunications facility is appropriate, and the Hearing Examiner would not take evidence on that issue. Tr. 10; 206-208.

The record was held open until October 13, 2011, so that Petitioners could file a minor revisions to their Site and Landscape Plans, ensuring appropriate screening, and submit them to Technical Staff and Mr. Hockstra for their review. Tr. 223-224.

A. Petitioners' Case

1. Jacob Goralski (Tr. 22-69):

Jacob Goralski testified that he has a degree in civil engineering, but is currently an engineer in training in the state of Texas. He is not certified in Maryland, and his work is therefore reviewed by an engineer licensed in Maryland. He has worked on at least a thousand sites designing them and the cell towers. He is a subcontractor for T-Mobile. The Hearing Examiner, noting that it would be better if the expert witness was certified as a civil engineer since he would be talking about engineering matters, found that Mr. Goralski, nevertheless has expertise in the site design of telecommunications facilities. He was therefore accepted as an expert in that field. Tr. 22-36.

Mr. Goralski identified 11 X 17 copies of the site plan (Exhibits 23(a) –(f)). He described the site and the proposed gravel access road. He indicated the setbacks as 729 feet to the north, 1,121 feet to the east, 393 feet to the south of the Pepco easement, and then 429 feet to the west, Georgia Avenue. He estimates it is 625 feet to the nearest home. Even on the property itself, it's more than 300 feet. Tr. 41-43.

Mr. Goralski further testified that there would be a six-foot chain link fence all the way

around a 50 x 50 compound. No trees will be removed. Petitioner plans a 120-foot monopole topped by a 4-foot lightning rod. The monopole and related equipment will be contained within a 2,500 square-foot fenced compound (50 feet by 50 feet). Two radio base station equipment cabinets will be placed on a 10 foot by 20 foot concrete pad within the proposed compound. A third cabinet may be added in the future. Tr. 47. Also within the compound, but not on the concrete pad, will be a proposed “Mesa” cabinet, which is part of the equipment used by the facility, and space for three additional carriers. There will be a light turned on only for servicing. There will be no light on the tower. Tr. 44-57.

According to Mr. Goralski, the project is not within the 660 foot PMA buffer for the Potomac River. Tr. 65.

2. Oakleigh J. Thorne (Tr. 70-107):

Oakleigh J. Thorne, a certified general real estate appraiser in the State of Maryland and a member of the Appraisal Institute, testified as an expert in real estate appraisals. Mr. Thorne noted that even though he is a real estate appraiser, he is not doing appraisals, *per se*, but rather testifying as to the impact of the presence of a monopole on the price of a property that’s adjacent to it versus the lack of its impact on a property that’s distanced from the monopole. “All we’re doing is comparing the price per square foot of that home within view of this monopole to the price per square foot of a [comparable] home that is not within that impact or view shed.” Tr. 82.

Mr. Thorne testified that multiple studies have indicated that the presence of a cell tower does not diminish property prices of nearby residences, and in some instances people may be willing to pay a premium to get better internet access near a cell tower. Tr. 88 and 101. He does not do before and after studies. Rather he finds sales that were proximate to each other, within a couple of months of each other, of similar homes and similar lots. He found no evidence that sellers or buyers of homes within the visual impact area either discounted the price or experienced

extended marketing periods to execute a sale due to the visual presence of a communication device. According to Mr. Thorne, there are studies by the Appraisal Institute or articles that have been published by the Appraisal Institute that are consistent with his findings. Tr. 80-101.

Specifically, his firm, Thorne Consultants, has been studying the impact of cellular telephone monopoles, the traditional monopoles like this one, from 1998 up to and including March of this year. Two of these studies were done in Montgomery County. One is at the Bullis School at Democracy Boulevard and Falls Road. The other one in Montgomery County is at Hampshire Greens which is a golf course community up near Burtonsville up off of 198. The towers are on the south side, and the north side is a golf course community. The Bullis School site is a 135-foot tower on the edge of the recreational field that abuts within about 180 feet of the back deck of a \$2 million home on Stapleford Court. Tr. 70-97.

Mr. Thorne further testified that he is familiar with this proposed site and the area, and that the proposed cell tower would not, in his opinion, lower sales prices of houses in the area. Tr. 91-94.

3. Curtis Jews (Tr. 108-165):

Curtis Jews testified as an expert in Radio Frequency (RF) Engineering for T-Mobile. Mr. Jews is T-Mobile's lead RF engineer for the entire State of Maryland and the Washington, D.C. area.

Mr. Jews introduced Exhibit 25, a cell tower vicinity map, showing the proposed wireless facility, which is labeled as 7 WAN 576D Sunshine Farms, and nearby T-Mobile cell towers. He testified that the area of the proposed facility is in need of improved coverage for voice and also for data. At this time, there is coverage but it is unreliable coverage. Tr. 113.

Mr. Jews used two coverage maps, Exhibit 9(a) showing current on-air coverage around the site and 9(b), showing current on-air coverage with the proposed site, WAN-576D, activated. Green

is in-building coverage, which is the coverage that one can expect inside of the home. Blue is in-vehicle coverage, and the yellow is the on-street coverage. Tr. 114-115. The current coverage map is created by drive test data that T-Mobile collected and then analyzed using modeling software keyed to the type of area. In the drive study, data collectors have receivers in their automobiles, and they drive around on many roads to collect as many samples as possible to make the data as dense as possible. It shows T-Mobile what the signal losses are associated with that area. Tr. 128-132.

At the subject site, 7 WAN-576D, there is currently a lack of in-building coverage. Exhibit 9(b), showing the expected coverage with 7 WAN-576D on air, there is an improvement in coverage. Where there was a lot of yellow, which is on street coverage, and blue, which is in vehicle, there now is in-building coverage, which is green, and more of the blue in-vehicle coverage. Thus, the new facility would fill in the gap and provide reliable coverage in homes and businesses, with sufficient capacity for Internet, texting and video streaming. Tr. 115-116.

For the twelve month period from August 2010 to August 2011, 3,429 calls to 911 were made in this sector. Tr. 117-120. Although only one percent of calls were dropped in this time period, Mr. Jews testified that this figure does not reflect the need for data coverage and additional capacity in the system now and in the future. Tr. 121-141.

Mr. Jews introduced Exhibit 26, his certificate of compliance with FCC standards and guidelines. Tr. 142. He testified that T-Mobile will not exceed the FCC limits on radio frequency emissions. Tr. 143.

On cross-examination, Mr. Jews admitted that he did not know the number of residences and businesses in the affected area, nor that on a portion of the area, no buildings are permitted. Tr. 144-150. Additional cross-examination addressed whether some users used land lines rather than cell phones and whether cell phones are permitted to be used while driving. Tr. 150-162.

4. Hillorie Morrison (Tr. 166-209):

Hillorie Morrison works for Network Building and Consulting, and her firm acts as T-Mobile's agent for purposes of zoning. She testified as an expert in land use planning. Tr. 166-171.

Ms. Morrison further testified that when T-Mobile erects a new monopole, it does a visual test, using a red balloon (about three feet in diameter) raised to the height of the proposed monopole, 120 feet in this case. Visibility is examined at various points around the site. T-Mobile then simulates what the actual monopole would look like based on the 120-foot height and the style of the pole, as shown in photographs. The location map marked "WAN-576" is Exhibit 10(a). WAN-576 pertains to this particular transmission tower. The red star in the center shows the location of the monopole based on its coordinates. The various blue dots show the point where Ms. Morrison stood to take the picture, and looking towards the site, underneath in red, it shows how far that point is from the site. These photographs depict the site as one would see it from the location that's indicated on the photograph. Tr. 172-174.

Ms. Morrison noted that in some of the photos you can see telephone poles and in others the nearby Pepco transmission towers, which are 130 feet tall. Tr. 174.

T-Mobile talked to Pepco about potentially co-locating its antennas on the Pepco towers very close to this proposed facility, but since this particular transmission facility carries very high voltage lines, they would not permit T-Mobile to locate antennas at the top of their towers. Pepco did say Applicants could locate 20 feet below all the equipment that is on their poles, but that height would not meet T-Mobile's transmission coverage needs. Tr. 174-178. T-Mobile considered other possible sites, but couldn't find any other structures tall enough. This particular application does not require any setback waivers. Tr. 178.

The Montgomery County Tower Committee reviewed this application and found that there

was a need, and that there were no other possible structures to co-locate on. They also that the height was appropriate and that we could accommodate co-location. Tr. 179.

Ms. Morrison further testified that the parcel is located in an RC Zone, and the Zoning Ordinance permits telecommunications facilities towers in an RC Zone. In her opinion, the proposal is consistent with the master plan and will be in harmony with the general character of the neighborhood. The telecommunications tower will be right next to a stand of very mature Leyland Cypress. They're planted very densely. They are a good 40 feet tall, maybe taller. Also, the tower will be visually close to the line of very prominent power transmission towers. Even with no leaves on the trees, the proposed facility blends in well with what you can see in the area. It's not invisible, but it doesn't stick out that much more than the existing poles do for the utility line. And in many places, there's no view at all. Tr. 180-181.

The tower will not be lit. Ms. Morrison also introduced a report done by the Jeppesen Company that investigates whether the proposed telecom installation is in accordance with the FAA and FCC policies. Exhibit 28. Jeppesen concluded that FAA notice is not required, given the height of the tower, and that marking and lighting is also not required. T-Mobile doesn't use generators. They use backup batteries so there's not an issue of vibration. Ms. Morrison believes it enhances health and safety by improving wireless communication. As you have more antenna sites, it's easier for a 911 responder to find the person who is making the call. Tr. 181-182.

Ms. Morrison further testified that the facility will be served by adequate public services and facilities and there will be no impact on sewer or water, education or transportation. Tr. 184. She also introduced an affidavit from William O'Brien, who is the real estate manager at T-Mobile, testifying that T-Mobile, when it installs the tower, will register any batteries in the County's high-use facility registration program. Exhibit 29.

T-Mobile will use a NorthStar battery. Exhibit No. 30 is a fact sheet that describes the

chemical safety information with regard to the radio base station cabinets used in T-Mobile sites and the specifications sheet for NorthStar batteries. It states that T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. Throughout an extreme range of operating conditions, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment. The EPA classifies NorthStar NSB 100-FT battery as spill proof. Tr. 185.

Ms. Morrison stated that T-Mobile will be happy to comply with Technical Staff's recommendation that the screening trees be native species at an initial height of six feet. Tr. 186-187. Revised plans would be submitted by Applicant after the hearing for review by Technical Staff and Mr. Hockstra.

Applicants' counsel introduced two photos of the nearby Pepco power lines which he took. Exhibits 31 and 32. Tr. 191-194.

Ms. Morrison further testified that T-Mobile will comply with all of the general and specific requirements for the special exception. There will be a small sign, as required. Tr. 195-196.

In response to a question from the Hearing Examiner as to whether Zoning Ordinance §59-G-2.58(a)4, requirement that the support structure must be sited to minimize its visual impact means minimize it on the site that you've chosen or minimize it over some broader area, Ms. Morrison opined that once you find a parcel high enough to meet the RF objective; which has vegetation on it; satisfies all the setbacks; the landlord is willing to lease; on land susceptible to installing a telephone line and an access road; and the facility can be sited in a sensitive way which meets the intent of the Zoning regulations, then the requirement has been satisfied. It doesn't mean that you need to find some other parcel that could do the same thing. Tr. 204-206.

B. Community Witness

Joshua Hockstra (Tr. 20-21; 211-223):

Joshua Hockstra testified that he lives at 2612 Triadelphia Lake Road, Brookeville, Maryland, adjoining the subject site. He voiced his concerns about the cell tower being in his “backyard.” He is not sure he would have bought the land if the tower was there today. He feels it is “a visual pollutant” and he is not sure that T-Mobile actually needs a service there. His cell phone coverage with another carrier is quite good. Mr. Hockstra is greatly concerned about depreciation of the property values. Tr. 20-21. He stated (Tr. 211):

As an adjacent property owner, I do not see the need for a cell tower in my backyard. I built this house because of the pristine views and beautiful horizons. If I knew a cell tower was going to be built in my backyard, I would never have bought the property and built my house here. Brookeville is a historical town in a rural setting and this will be a visual pollutant to all the people that pass through it and enjoy the Triadelphia Lake recreational area.

Exhibit 10(f) is a photograph which depicts Mr. Hockstra’s home, with the Pepco lines and the simulated cell tower (at a distance of about a quarter of a mile) depicted in the background. Tr. 212. The tower will be in his view.

Mr. Hockstra stated that for Mr. Thorne to state that the cell tower will not have a negative impact on his property value “is naive at best.” Tr. 213. He is not sure that he will be able to sell his home with that cell tower in his “backyard.” Tr. 213.

On cross-examination, he indicated that the Pepco lines and telephone poles were already there when he purchased the land, but if the proposed tower were located closer to the Pepco lines, then he wouldn’t have as big of an issue. Tr. 215-217. On re-direct, Mr. Hockstra questioned the need for the tower because some of his workers have T-Mobile service and have coverage in his home. Tr. 218-219.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 20).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with

inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff noted the following inherent physical and operational characteristics necessarily associated with a telecommunications facility use (Exhibit 20, p. 9):

- A support structure of significant height with antennas attached at that height;
- Visual impacts associated with the support structure’s height;
- Radio frequency emissions;
- A technical equipment area that may or may not be enclosed;
- Necessary vehicular trips for maintenance or emergencies.

The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. That is the case here, except that even the visual impact is reduced in this instance because the telecommunications facility will be set back far from the nearest dwelling; it will be sited nearby existing Pepco power transmission towers of similar height; and it will be adequately buffered by trees. There are no unusual, negative characteristics of the site.

Technical Staff suggests one non-inherent characteristic of the site – that it is located “near

open space used for recreation and protection of a regional drinking water reservoir.” Exhibit 20, p. 9. However, Staff does not suggest this as a basis for denial of the petition because “[t]he proposed facility is located away from the road used for access to the Triadelphia recreation area and from the related open space.” Exhibit 20, p. 9.

For all the reasons discussed in Part II of this report, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the approval of the Transmission Facilities Coordinating Group, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A telecommunications facility is a permissible special exception in the RC Zone, pursuant to Code § 59-C-9.3(f).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.58 for a telecommunications facility as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioners' property is located in the area subject to the 2005 Olney Master Plan. For the reasons set forth in Part II.D. of this report, the Hearing Examiner finds that the planned use is not inconsistent with the goals and objectives of the Olney Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed installation will be in harmony with the character of the neighborhood because its visibility from the adjacent community will be ameliorated by the large setbacks, screening trees and its proximity to Pepco transmission lines of similar height. There will also be no significant impact on traffic or parking. The proposed use is a low intensity use, only requiring on-site personnel for emergency repairs and regularly scheduled maintenance visits about once a month. Technical Staff report (Exhibit 20, p. 10).

Based on these facts and the other evidence of record, the Hearing Examiner

concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for all the reasons stated immediately above, and those discussed in Part II.C. of this report, including the testimony of Oakleigh Thorne, a real estate appraiser who testified that cell towers do not negatively affect the prices of nearby homes. Tr. 70-107. Therefore, the Hearing Examiner finds that the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The tower will have no lights, and the equipment building will not be illuminated at night except when night-time servicing is required. Technical Staff found that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Exhibit 20, p. 11. Thus, the undisputed evidence supports the conclusion that the telecommunications facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed special exception use will not change the intensity of special exception uses in any substantial way. The only other special exception in the neighborhood is a lawn care firm directly across Georgia Avenue (S-1713), which is characterized by Technical Staff as generally agricultural in character. As stated by Staff, the passive nature of the proposed telecommunications facility, like the electric transmission lines that adjoin the property to the south, will not change the area's existing character, even when considered in the context of the existing special exception use across the street. Exhibit 20, p. 11.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Moreover, the federal Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

Petitioners' radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license

regarding radio frequency emissions. Tr. 142-143. Petitioners will also be required to comply with all applicable hazmat regulations governing the site. The Hearing Examiner therefore concludes that the proposed telecommunications facility will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use. Tr. 184.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area

Transportation Review (LATR) and Policy Area Mobility Review (PAMR).

Technical Staff found that the proposed use would add no additional trips during the peak-hour weekday periods. Thus, the requirements of the LATR and PAMR are satisfied without a traffic study. By its nature, the site requires no school, water or sewer services. Technical Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable public facility standards. Exhibit 20, p. 11.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use will have no impact on public safety, the Hearing Examiner so finds. Exhibit 20, p. 11.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 20) and the conclusion of the Transmission Facilities Coordinating Group (Exhibit 7), provide sufficient evidence that the specific standards required by Section 59-G-2.58 are satisfied in this case, as described below.

Sec. 59-G-2.58. Telecommunication facility

(a) Any telecommunication facility must satisfy the following standards:

(1) A support structure must be set back from the property line as follows:

A. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.

B. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from

residential or agricultural zoned properties.

C. The setback from a property line is measured from the base of the support structure to the perimeter property line.

D. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Conclusion: Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the total height of 124 feet for the cell tower and lightning rod, a 124 foot setback from each property line is required. This setback is easily met on all sides: As shown on Exhibits 40(a)(2) and (3), it is 393 feet from the southern property line (Pepco easement); 429 feet from the western property line (Georgia Avenue); 729 feet from the northern property line; and 1121 feet from the eastern property line. Tr. 41.

(2) *A support structure must be set back from any off-site dwelling as follows:*

A. In agricultural and residential zones, a distance of 300 feet.

B. In all other zones, one foot for every foot in height.

C. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.

D. The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

Conclusion: The subject site is in an agricultural zone, so the 300-foot setback requirement applies, and it is more than met in this case. Applicants' site designer, Jacob Goralski, testified that it is approximately 625 feet to the nearest home. This distance

was not noted on the plans because the distance from the proposed tower to the nearest property line (on the south) is more than the 300-foot minimum (393 feet), which is shown on the plans. Tr. 42. Thus, the proposal is in compliance with this requirement.

(3) *The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.*

Conclusion: The support structure, including the lightning rod, will be 124 feet in height, and the antenna will be mounted at about the 120-foot level. The antenna will reach up to a height of approximately 123 feet. Thus, the proposal meets the requirement of being under 155 feet. A condition has been proposed in Part V of this report to ensure compliance with the certification requirement.

(4) *The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.*

Conclusion: As discussed in Part II.C of this report, the proposal conforms to this requirement. In addition to the nearby trees and the nearby Pepco power lines, the compound will be surrounded by a 6-foot tall fence and native trees of at least the same height, approved by Technical Staff. Exhibits 39 and 40(a)(6).

(5) *The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if:*

(A) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and

(B) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.

Conclusion: The property owner, Sunshine Farms, LLC, is a co-petitioner. The facility will be capable of supporting three telecommunications carriers in addition to T-Miobile. Exhibit 3, p. 1.

(6) *No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

Conclusion: No signs or illumination are proposed, except the two square foot sign required by subsection (8), below, and a light on the equipment shelter to be used if emergency repairs are required at night.

(7) *Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.*

Conclusion: Petitioners' site plan (Exhibit 40(a)(3)) indicates that the facility will comply with this and all other standards set forth in this section, and a condition to that effect is recommended in Part V of this report.

(8) *All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number*

of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: The required sign will be installed, and a condition so stating is recommended in Part V of this report.

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: Petitioners' site plan indicates that the facility will comply with this and all other standards set forth in this section, and a condition to that effect is recommended in Part V of this report.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than 90 days old, except that a recommendation issued within one year before June 22, 2010, must be accepted for one year from the date of issuance. The recommendation of the Transmission Facility Coordinating Group must be submitted to the Board at least 5 days before the date set for the public hearing.*

Conclusion: A recommendation of approval, dated May 6, 2011, was filed herein as Exhibit 7. It was less than 90 days old when the petition was filed on May 24, 2011.

(12) *The Board must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.*

Conclusion: As noted, both the Transmission Facility Coordinating Group and the Technical Staff recommended approval. The Hearing Examiner recommends that the Board make the finding that there is a need for the proposed telecommunications facility and that it will be appropriately located, based on the evidence set forth in Part II of this report.

(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities. As discussed above, the proposed use meets those standards.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: Technical Staff did not recommend any parking for the proposed facility because it will require only one visit per month for service.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.

Conclusion: No waiver is needed because the subject site is located on a large property, which has more than adequate frontage. In any event, the facilities for ingress and egress

of vehicular traffic are adequate to meet the requirements of Section 59-G-1.21.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: According Technical Staff, the property is exempt from submitting a forest conservation plan (Exhibits 6 and 20, p. 7).

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: This section pertains only to sites in special protection areas, where water quality plans are required. This site is not within an SPA.

(f) Signs. The display of a sign must comply with Article 59-F.

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two square foot sign required by the special exception.

(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: Inapplicable. The subject site is in an agricultural zone, not a residential zone.

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a

recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: Inapplicable. The subject site is in agricultural zone, not a residential zone.

Based on the testimony and evidence of record, I conclude that the telecommunications facility use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2811 for a special exception to construct and operate a telecommunications facility, including a 120-foot tall monopole topped by a 4-foot lightning rod, and related equipment, at 22611 Georgia Avenue, Brookeville, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.
2. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
3. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to

contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

4. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
5. There must be no outdoor storage of equipment, except equipment specified in the Site Plan.
6. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
7. The facility shall be available for co-location of up to three carriers.
8. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.
9. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
10. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 26, 2011

Respectfully submitted,

Martin L. Grossman
Hearing Examiner